IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1753

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, INC. and KIRBY LUMBER CORPORATION,

Petitioners,

against

S. WILLIAM GREEN, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES CITED

MISCELLANEOUS AUTHORITIES

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Counterstatement of Question Presented

Is a sham merger, by which a fiduciary misappropriates 80% of its cestuis' property without their knowledge or consent, fraud and deceit within Rule 10b-5 under Section 10(b) of the Securities Exchange Act of 1934?*

* Presence of the other ingredients of a 10b-5 violation (purchase-sale of a security via mails and interstate commerce) is not contested.

Controlling Decisions of Supreme Court

The Court of Appeals decision against petitioners (collectively "Santa Fe"), the defendant fiduciary, is required by the decisions of the Supreme Court in *Supt. of Insur.* v. *Bankers Life,* 404 U.S. 6 (1971); *SEC* v. *Capital Gains Bureau,* 375 U.S. 180 (1963); *United Housing Found.* v. *Forman,* 421 U.S. 837 (1975); *SEC* v. *Natl. Securities, Inc.,* 393 U.S. 453 (1969); and *Radzanower* v. *Touche, Ross & Co.,* —— U.S. —— (6/7/76). It should therefore be summarily affirmed with respect to Santa Fe.*

Counterstatement of the Case

1. Summary Statement.

The complaint in substance alleges the following:

(a) A sham, short form merger without corporate purpose was effected by Santa Fe, the fiduciary of the Kirby Lumber Co. stockholder-beneficiaries, for the purpose of misappropriating their stock, known by the fiduciary to be worth at least $772 per share, for $150 per share, the fiduciary unilaterally fixing that price and pocketing the difference, some $15,000,000. The mechanism was the creation of a paper corporation and "merging" it into Kirby, and cancelling the minority stock at $150 per share. Appraisal Associates on February 19, 1974 had submitted to the defendants a written appraisal of the land (exclusive of minerals), timber, buildings and machinery belonging to Kirby as of December 31, 1973, stating its *market value to be $320,000,000* (39a).** The *book value* of these

* There is now before the Court another certiorari petition arising from the decision below, No. 75-1660, filed by plaintiffs S. William Green, et al. to review the dismissal of the complaint against defendant Morgan Stanley & Co. as an aider and abettor of the principal fraud committed by Santa Fe.

** References to the opinions below are to Appendix C of the Santa Fe Petition for certiorari.

assets was only $9,000,000. The difference of $311,000,000 was $622 per share over and above the book value of those assets of Kirby.

(b) That forced purchase-sale of stock and misappropriation of most of the proceeds by their fiduciary were without the knowledge or consent of the stockholder-beneficiaries and without prior notice of any kind to them.

(c) After said misappropriation the fiduciary, in advising the stockholder-beneficiaries of the consummated freeze-out, attempted to disguise the unconscionableness of the price it had unilaterally fixed by transmitting to them a dishonest appraisal it had obtained for the purpose from Morgan Stanley & Co. that the stock was worth only $125 per share.

(d) The foregoing "device, scheme or artifice" or "act, practice or course of business" (accomplished by the use of means and instrumentalities of interstate commerce and the mails) had the purpose and effect "to defraud", or to "operate as a deceit upon", the stockholder-beneficiaries and their corporation, in connection with the said purchase-sale of stock.

2. More Complete Statement, in No. 75-1660.

For a more complete statement we incorporate the Statement of the Case in our Petition as to Morgan Stanley & Co., No. 75-1660, pp. 2-14.

ARGUMENT

I. Santa Fe's Two Faulty Premises

(1) Santa Fe's petition is based on two premises, neither of which is tenable. *First,* it is not so, that fraud is confined to the verbal—a misstatement or omission to state. *Second,* in fact, Santa Fe is guilty of both misstatement and omission, as well as of non-verbal fraud.

II. The Sham Merger to Mulct the Beneficiary Was a Fraudulent Device or an Act Operating to Deceive

(2) The fiduciary went through the form of a merger without economic substance, creating a paper corporation and merging it into Kirby for the mere purpose of appropriating the minority-beneficiaries' stock at 20% of its true value. That was plainly a sham, a fraudulent device or an act operating as a deceit. *Supt. of Insur.* v. *Bankers Life,* 404 U.S. 6 (1971) applied the first and third clauses of Rule 10b-5 which proscribe non-verbal frauds (at 9), and held that "misappropriation is a 'garden variety' type of fraud" (at 11, n. 7), within the language and contemplation of the Rule and Section 10(b). That case squarely applies to ours. The only difference is that there the fiduciary pocketed all the proceeds and here the fiduciary misappropriated "only" 4/5ths the value of its cestuis' stock, some 15 million dollars. As the Court below held:

> We hold that a complaint alleges a claim under Rule 10b-5 when it charges, in connection with a Delaware short-form merger, that the majority has committed a breach of its fiduciary duty to deal fairly with minority shareholders by effecting the merger without any justifiable business purpose. The minority shareholders are given no prior notice of the merger, thus having no opportunity to apply for injunctive relief, and the proposed price to be paid is substantially lower than the appraised value reflected in the Information Statement. (45a)

(3) *SEC* v. *Capital Gains Bureau,* 375 U.S. 180 (1963) set forth the following as the applicable standard of what constitutes fraud for the purposes of the securities laws:

> [E]quity regarded it [fraud] as a conveniently comprehensive word for the expression of a lapse from the high standard of conscientiousness that it exacted from any party occupying a certain contractual or fiduciary relation toward another party. (193).

It does not take argument to establish that Santa Fe's using a sham merger to misappropriate most of its cestuis' equity constitutes "a lapse from the high standard of conscientiousness . . . exacted fron any . . . fiduciary".* The Court held that scalping** was a species of fraud (at 181); it also noted that "*any practice* which operates 'as a fraud or deceit' " includes non-disclosure "as *one* variety" thereof (198-199).

(4) *United Housing Found.* v. *Forman,* 421 U.S. 837 (1975) held that in applying the securities laws "form should be disregarded for substance and the emphasis should be on economic reality" (848). The Court stated:

> The primary purpose of the Securities Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Act is on the capital market of the enterprise system: . . . the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying "a transaction, and not on the name appended thereto." (849)

Here there was no economic reality to the merger. A paper corporation was created and immediately "merged" into Kirby Lumber as a mere device whereby Santa Fe,

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* In *Supt. of Insurance,* the Court stated, too, that "The Congress made clear that 'disregard of trust relationships by those whom the law should regard as fiduciaries, are all a single seamless web' along with manipulation, investor's ignorance, and the like" (404 U.S., at 11-12).

** Scalping is purchasing a security shortly before recommending it and selling immediately after.

the majority holder, could squeeze out the Kirby minority at a small fraction of the true value of the minority's stock. As the Sixth Circuit U.S. Court of Appeals held (*Marsh* v. *Armada Corp.*, 4/5/76, CCH Fed. Sec. L. Repts. ¶ 95,496) in explaining the 2nd Circuit's decision below:

> In *Green* and *Marshel* the merger was a sham transaction designed to expropriate the ownership interests of the minority shareholders (at page 99,525)—

at a small fraction of their value.

The sham merger as a device to misappropriate the beneficiary's property was, plainly, a fraudulent and deceptive act, practice or scheme under this Court's decisions.

(5) *SEC* v. *Natl Securities, Inc.*, 393 U.S. 453 (1969) held that even though a State has approved a merger of two corporations with appraisal rights as the remedy for the minority stock, "The paramount federal interest in protecting shareholders" (463) dictated that the federal court could set aside the merger under Rule 10b-5 (463-4). Delaware didn't sanction fraud and even if it did the paramount federal interest in protecting stockholders from fraud in securities purchase-sales would have to prevail. As the Court stated in *Supt. of Insurance*, 404 U.S. at 12, "practices legitimate for some purposes may be turned to illegitimate and fraudulent means". The Court below didn't rule out all short-form mergers (62a). But sham mergers by a fiduciary to mulct the beneficiary are simply an instance of turning a practice "legitimate for some purposes" into a "fraudulent means."• And in that case, that the State provides an appraisal remedy does not take the case out of the ambit of 10b-5. *Natl Securities,*

• As long ago as 1201, a writ of deceit could be sued out against a defendant "who had misused legal procedure for the purpose of swindling someone." Prosser on Torts (4th ed. 1971) p. 685.

Inc., supra; Supt. of Insurance, 404 U.S., at 12:

> Since there was a "sale" of a security and since fraud was used "in connection with it", there is redress under Section 10(b), whatever might be available as a remedy under state law.

In *Radzanower* v. *Touche, Ross & Co.*, —— U.S. —— (6/7/76), the Court stated:

> The primary purpose of the Securities Exchange Act was . . . to provide full and honest mechanisms for the pricing of securities and to assure that dealing in securities is fair and without undue preferences or advantages among investors. (CCH Sup. Ct. Bul, at B2986)

and

> The 1934 Act was enacted primarily to halt securities fraud (Id, at 2987).

A sham merger effected to mulct one's cestuis is an "[un]fair and [dis]honest mechanism for the pricing of securities"—a species of "securities fraud" that it was the primary purpose of the 1934 Act to halt.

(6) The sham transaction, whereby the dominant stockholder, a fiduciary, fleeced the minority, its cestuis, in the purchase and sale of securities, implemented by the use of means or instrumentalities of interstate commerce including U.S. mail and telephone, constituted a plain violation of Rule 10b-5 under the settled autorities. It disclosed Santa Fe's flagrant "intent to deceive, manipulate, or defraud" its cestuis in the stock acquisition, striking at the heart of Section 10(b) of the 1934 Act and SEC Rule 10b-5 thereunder, *Ernst & Ernst* v. *Hochfelder*, —— U.S. —— (March 30, 1976), Sl. Op. p. 7. What Santa Fe did is covered by the plain language of section 10(b) and rule 10b-5 and the policy of Congress, as expressed in

the legislative history of the section, to prohibit "any other cunning devices" (*Ernst & Ernst, supra,* at p. 16) that operate as a fraud in connection with the purchase and sale of securities. Rule 10b-5 was in fact originally inspired by purchasers' fraudulent and deceitful activities related to an upswing in the economy and to consequent takeovers by insiders of their cestuis' equity (*Ernst & Ernst, supra,* at 26, n. 32; 1 Bromberg, Securities Law—Fraud pp. 22.8-22.9).

(7) Many cases in the lower courts have also found non-verbal, fraudulent or deceptive acts; i.e. other than misstatements or omissions, to be violative of 10b-5 and other fraud provisions of the securties laws. E.g., *Schoenbaum* v. *Firstbrook,* 405 F2d 215 (2nd Cir., en banc), cert. den. 395 U.S. 906, inadequate price paid by controlling stockholder to corporation for stock, with inside knowledge of the true values, violates 10b-5.* We have found no cases to the contrary.

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* Accord: *Drachman* v. *Harvey,* 453 F2d 736 (2nd Cir., en banc), where fiduciary knowingly caused corporation to make improvident redemption of its convertible securities, that was a violation of 10b-5; *Marshel* v. *AFW Fabric Corp.,* —— F2d —— (2d Cir.) (Appendix F to Petition to Sup. Ct. in No. 75-1660), sham merger violates 10b-5; *Mutual Shares Corp.* v. *Genesco, Inc.,* 384 F2d 540 (2nd Cir.), reduction of dividends in order to effect reduction in market price of stock violates 10b-5; *Schlick* v. *Penn-Dixie Cement Corp.,* 507 F2d 374 (2nd Cir.), cert. den. 421 U.S. 976, market manipulation violates 10b-5; *Pappas* v. *Moss,* 393 F2d 865, 869 (3d Cir.), "where, as here, a board of directors is alleged to have caused their corporation to sell its stock to them and others at a fraudulently low price, a violation of Rule 10b-5 is asserted"; *Speed* v. *Transamerica Corp.,* 235 F2d 369 (3d Cir.), inadequate consideration paid by the control group for stock violates 10b-5; *Shell* v. *Hensley,* 430 F2d 819, 827 (5th Cir.), the unfair use of controlling influence in the purchase or sale of securities spells out a fraud under 10b-5; *Rekant* v. *Desser,* 425 F2d 872, 882 (5th Cir.),

> "We conclude, therefore, that when officers and directors have defrauded a corporation by causing it to issue securities for

(*footnote continued on following page*)

Judge Hays had previously dissented in part from the panel's decision in *Schoenbaum,* 405 F2d 200 (C.A.2), then wrote the reversing opinion for the *en banc* Court in *Schoenbaum,* 405 F2d 215, which essentially followed his earlier dissenting panel opinion. In that earlier opinion, Judge Hays stated with respect to the bargain sale of stock to the insider (215):

> What we have here then is a scheme by which the directors of Banff gave to the controlling stockholder (footnote omitted) and an affiliated corporation some millions of dollars worth of this corporation's property. *A plainer case of fraud would be hard to find.*

(*footnote continued from preceding page*)

> grossly inadequate consideration to themselves or others in league with them or the one controlling them, the corporation has a federal cause of action under § 10(b) . . . . The essence of the transaction is not significantly different from fraudulent misrepresentation perpetrated by one individual on another";

Hooper v. *Mountain States Securities Corp.,* 282 F2d 195, 204 (5th Cir.) cert. den. 365 U.S. 814, "the essence of the" 10b-5 "fraud" was "a scheme to get Consolidated to issue . . . stock for worthless property." *Dasho* v. *Susquehanna Corp.,* 380 F2d 262, 270 (7th Cir.), the concurring majority sustained a complaint that a self-deal merger on unfair terms violates 10b-5; *Travis* v. *Anthes Imperal Ltd.,* 473 F2d 515, 527 (8th Cir.), Rule 10-b-5 liability found even though "[t]he essence of the plaintiffs' complaint . . . is that the defendants violated § 10(b) and Rule 10b-5 by engaging in self-dealing. . . . Here, as in *Sup't of Insurance,* the defendants' self-dealing was a violation of a fiduciary obligation to minority shareholders . . ."; *Norris & Hirshberg, Inc.* v. *SEC,* 177 F2d 228 (U.S. Ct. App., D.C.), broker's purchases from, and immediate resales to, trusting customers, at higher prices, violates 10b-5 as fraud on customers; *Associated Securities Corp.* v. *SEC,* 293 F2d 738 (10th Cir.), broker's sale at excessive mark-up over market price violates 10b-5; *Hecht* v. *Harris Upham & Co.,* 283 F.Supp. 417, 432-3 (N.D. Calif.), broker's churning his customer's account, an abuse of confidence, "is a device, scheme or artifice to defraud" in violation of 10b-5; *Cooper* v. *North Jersey* Trust Co., 226 F.Supp. 972, 977-8 (S.D.N.Y.), sale of securities supposedly bought for borrower's account violates 10b-5.

As the U.S. District Court for Delaware held in sustaining a 10b-5 charge (*Voege* v. *Amer. Sumatra Tobacco Corp.*, 241 F.Supp. 369, 375):

> Plaintiff at bar was the subject of deception for when she acquired her stock she did so upon the justifiable assumption that any merger would deal with her fairly, only later to find, according to the complaint, that the terms of the merger were designed to defraud her.

With respect to fraud through self-dealing, Judge Mansfield below stated the following:

> Our conclusion that where there has been self-dealing on the part of corporate insiders, proof of misrepresentation or non-disclosure is not a *sine qua non* to the establishment of 10b-5 liability is shared by other Circuits. (60a-61a).

After citing and quoting from several cases, Judge Mansfield continued as follows:

> Defendants' efforts to reconcile these decisions by searching for some misrepresentation or non-disclosure ignores the court's plain language in each case and exalts form over substance. Such misrepresentations as may be found generally related to technical, trivial matters, having little or no relevance to the manipulative conduct giving rise to 10b-5 liability. Furthermore, in some of the cases the courts, in imposing § 10(b) liability were quite explicit in acknowledging the absence of misrepresentation or openly minimizing its import to the illegal conduct under challenge. (62a)

(8) At common law, too, fraud is not confined to misstatements or omissions to state. E.g. 12 Williston on Contracts (Jaeger ed.), pp. 321-2, 330-1, 332; Bouvier's Law Dict. (Rawle's Third Rev.), entry "FRAUD": it includes "any cunning, deception, or artifice, used to circumvent, cheat, or deceive another." As Prosser stated in discussing fraud by conduct, "actions may speak louder than words." (4th ed., 1971) pp. 694-5.

Thus, the fiduciary's misappropriation• of his cestui's property is, of course, also a fraud at common law, even if there were no misstatements or omissions to state. *Grin* v. *Shine*, 187 U.S. 181, 189, 195 (1902). A sham merger merely to eliminate a minority stockholder has been held to be a fraud against him at common law, *Bryan* v. *Brock & Blevins Co.*, 490 F2d 563, 570-571 (5th Cir.) cert. den., 419 U.S. 844,•• and in New York under the Martin Act, *Peop.* v. *Concord Fabrics, Inc.*, 50 AD2d 787 (1st Dept.) aff'g. on op. below, 83 M 2d 120, involving the same merger invalidated under 10b-5 in *Marshel, supra.*••• More, generally, "fraud" includes "cases arising from some peculiar confidential or fiduciary relation between the parties, where advantage is taken of that relation by the person in whom the trust or confidence is reposed." Bouvier's Law Dict. (Rawle's Third Rev.), p. 1304 entry "FRAUD". The authorities uniformly agree that a fiduciary's taking unfair advantage of his cestui is, without more, a species of fraud at common law. E.g. Amer. Jurisp.2d "Fraud and Deceit": action for fraud and deceit maintainable where fiduciary does not exercise "the utmost good faith in the transaction" or he obtains an unfair advantage "whether the unconscionable advantage was obtained by misrepresentation, concealment or suppression of material facts, artifice, or undue influence" (§ 15,

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• "Misappropriate"—"To appropriate wrongly or misapply in use, especially wrongfully and for oneself". Webster's New International Dictionary, 2nd Ed., Unabridged.

•• Accordingly, the Georgia corporate provision making appraisal the exclusive remedy was held inapplicable as a matter of state law.

••• The wording of the Martin Act (N.Y. Gen. Bus. L. § 352(1)) is similar to clauses 1 and 3 of SEC Rule 10b-5.

pp. 38-39). "[I]f in a transaction between parties who stand in a relationship of trust and confidence, the party in whom the confidence is reposed obtains an apparent advantage over the other, he is presumed to have obtained that advantage fraudulently" (§ 441, p. 602).*

Indeed, at common law, even in the absence of a fiduciary relationship, the "inadequacy of consideration may be so flagrant as of itself to afford a presumption of fraud." Am. Jurisp. 2d, *supra,* at § 440, p. 601. Accord: 3 Pomeroy, *supra,* § 927, p. 634. If the disproportion is great enough it may furnish "decisive evidence of fraud." *id.* Here Santa Fe appropriated 4/5ths of the minority's stock value. The disproportion becomes even more significant as to "the fact of fraud" because there was no "deliberation by the parties [seller and purchaser]", Pomeroy, *supra,* § 928, p. 637—Santa Fe having fixed the price unilaterally and effected the transaction without the knowledge or consent of the stockholder sellers.

III. Moreover, There Was Both Non-Disclosure and Misstatement

A. The Non-Disclosure

(9) The merger was consummated without any notice or disclosure whatsoever to the minority stockholders of Kirby or consent by them. The first they heard of it was

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* Accord: 3 Pomeroy's Equity Jurisp. (5th ed. Symons) p. 421: "Every fraud, in the most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith in the broad meaning given to the term by equity,—the *bona fides* of the Roman law."; Prosser on Torts (4th ed. 1971) p. 697.

At common law, a strict Trustee may in no event buy his cestui's property from himself because of the temptation to defraud. Bogert, Trusts and Trustees (2d ed.) § 543, n.2.10.

when Santa Fe informed them that their stock had already been taken by Santa Fe at $150 per share and if they didn't like it their only remedy was an appraisal proceeding. As Judge Mansfield held below (58a-59a):

> Defendants place heavy reliance upon *Popkin* v. *Bishop,* 464 F.2d 714 (2d Cir. 1972), as representing a departure from our steady trend toward an expansive view of the reach of the federal security laws. However, to the extent that *Popkin* is at all relevant to the short-form merger context, it impliedly supports the application of the *Schoenbaum-Drachman* rule to this case. In *Popkin,* unlike the present case, *prior* stockholder approval of the proposed merger was required. Full *advance* disclosure of the relevant facts regarding the merger exchange ratios to the minority stockholders was effective protection because it gave them the opportunity, as Judge Feinberg noted, to seek state court injunctive relief which was purportedly available under Delaware law. *Id.* at 720. Here, in contrast, disclosure *after* the merger has been consummated is virtually the equivalent of no disclosure at all, since it comes too late to enable the minority to invoke state law for protection against an unwarranted squeeze-out. Indeed, it is well recognized that the state post-merger appraisal procedure does not provide an alternative remedy comparable to federal relief. (footnotes omitted)

(10) The authorities are in accord with the decision below that only disclosure before the fact could in any event give the kind of investor protection contemplated by the anti-fraud provisions of the securities laws.* Thus, Harlan, J., explaining why purchase, cheap, by the control, on inside information, violated 10b-5 (*Speed* v. *Trans-*

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* Though a non-verbal fraud may not be neutralized even by advance disclosure, *Marshel, supra.*

ameria Corp., 235 F2d 369) stated:

> Had shareholders been aware of the concealment, they would undoubtedly have refused to sell. *Capital Gains Bureau, supra,* 375 U.S. 180, at 205 (dissg. op.).

The disclosure must be in advance so that the investor can protect himself by preventing the sale. Telling him after the sale is shutting the barn door after stealing the horse. So in *Bailey* v. *Meister Brau, Inc.*, —— F2d —— (7th Cir.), 5/6/76, CCH Fed. Sec. L.Rep. ¶ 95,543, the Court held that it was a violation of 10b-5 for "the controlling stockholder [to cause] the corporation to engage in a securities transaction in which the stockholder has a conflict of interest [and which] was unfair to the corporation," because he had not disclosed information "which reflects on the fairness of the transaction" to "the only stockholder whose interests lay with the corporate entity":

> He was thus deprived of any opportunity to protect the interests of the corporation and of himself as minority shareholder (p. 99,735).•

B. The Misstatement

(11) A material part of Santa Fe's scheme consisted in obtaining a fraudulent appraisal from Morgan and in persuading the minority stockholders that the $150 it had unilaterally fixed for each share was fair; that would deter challenges in the courts. To that end it paid Morgan $125,000 for Morgan's undervaluation of Kirby stock at $125, worth at least $772 per share.

• Cf. *Nader* v. *Allegheny Airlines*, —— U.S. —— (6/7/76), a common law action of fraud and deceit was maintainable by a passenger for nondisclosure by an airline of its overbooking practice which resulted in his being bumped, even though he was subsequently informed that by reason of the overbooking he could obtain compensation for the bumping.

By transmitting the dishonest appraisal to the stockholders, Santa Fe adopted, and made its own, a misstatement, as part of its fraudulent scheme.

IV. Santa Fe's Petition Misrepresents the Plaintiffs' Position in the Lawsuit

(12) Contrary to the Petition, plaintiffs have never conceded at any time "the absence of any deceit" (Pet. p. 7), or that the gravamen of the complaint was "merely" undervaluation (Pet. p. 7), or that there was full disclosure (Pet. p. 3), or no misrepresentation (Pet. p. 3).

V. "Volume of Litigation"

(13) The decision below proscribes under 10b-5 sham mergers by which fiduciaries cheat their cestuis. This decision is compelled by the language and purpose of the rule and by the decisions of this Court; in addition, it will deter such sham mergers and so (contra Pet. p. 6) hardly, if at all, increase the number of cases.

VI. "A Federal Common Law of Corporations"

(14) This contention (Pet. p. 6) is meaningless hyperbole. The securities laws, designed to prohibit securities purchase-sale frauds effected via the U.S. mail or interstate commerce, are a constitutional exercise of federal supremacy. Section 10-b is a mandate of Congress and rule 10b-5 was validly promulgated thereunder. The federal courts will therefore enforce it "flexibly, not technically and restrictively." *Supt. of Insur., supra,* 404 U.S., at 12. See further paragraph (5) above, at 6-7.

Conclusion

That a sham merger, devised by a fiduciary simply to mulct its beneficiaries of 4/5ths of the value of their stock, consummated without any notice whatever to them and involving a dishonest appraisal transmitted with the post-merger notice to them, is fraud, needs no further briefing or oral argument.

The judgment reinstating the complaint against Santa Fe should be summarily affirmed.

Respectfully submitted,

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